

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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|-----------------------------|--------------------------------|
| SAMUEL K. LIPARI |) |
| (Assignee of Dissolved |) |
| Medical Supply Chain, Inc.) |) Case No. 08-03287 |
| <i>Plaintiff</i> |) (Appeal from |
| |) Case No. 06-1012-CV-W-FJG |
| |) State Court No. 0616-CV32307 |
| vs. |) Originally Case No. 05-0210- |
| |) CV-W-ODS) |
| US BANCORP, INC. |) |
| US BANK, NA |) |
| <i>Defendants</i> |) |

STATUS REPORT ON APPEAL

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following status report on the appeal as ordered by the Clerk of the Court.

STATEMENT OF FACTS

1. On November 26, 2008 the trial court judge Hon. Judge Carlos Murguia made a dispositive Memorandum and Order. See Exhibit 1.
2. The November 26, 2008 order specifies the dismissal of the plaintiff-appellant's remaining claims:

“IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys’ fees and expenses as ordered in the Judge Waxse’s November 26, 2008 order.

Dated this 26th day of November 2008, at Kansas City, Kansas.” [Emphasis in original]

November 26 Memorandum and Order page 4. [Emphasis in original]

3. On December 3, 2008 the plaintiff filed an amended notice of appeal encompassing this order of the trial judge Hon. Judge Carlos Murguia with the Kansas District Court (exhibit 2) and the Western District of Missouri. Exhibit 3.
4. On December 8 this court treated the amended notice of appeal as a new separate appeal docketing it as a new appeal under Case No. 08-3338.
5. This court ordered the plaintiff-appellant to show cause over what order he was appealing from (the Chief Deputy Clerk of the Court Douglas E. Cressler stating erroneously that the plaintiff was appealing from a magistrate order). See Exhibit 4 at page 2 ¶4.
6. The amended notice of appeal lists the trial court judge's memorandum and order:

“Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding \$700.00 in attorney fees and the trial judges' memorandum and order.”

Exhibit 2 Amended Notice of Appeal.

MEMORANDUM OF LAW

The district court's November 26, 2008 Memorandum and Order

“announces” a judgment of dismissal as all district court dispositive orders do prior to entry of judgment: “Fed. R. App. Proc. 4(a)(2) states that “[a] notice of appeal filed after the court announces a decision or order-- but before the entry of

the judgment or order -- is treated as filed on the date of and after the entry." *U.S. v. Scarfo*, 263 F.3d 80 at 87 (3rd Cir., 2001).

The plaintiff's appeal which this court placed in abeyance is now controlled by this court's precedent in *Lewis v. B. F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (*en banc*) ("In the situation like that before us, in which the other claims were effectively dismissed after the notice of appeal was filed, we believe Fed. R. App. P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. . . . In such cases generally we will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case.").

Respectfully submitted,

S/ Samuel K. Lipari
Samuel K. Lipari
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816-365-1306
saml@medicalsupplychain.com
Pro se

Certificate of Service

I certify that on December 10, 2008 I have served the opposing counsel with a copy of the foregoing notice using email and the US Postal Service having sent the copy with postage prepaid to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO lic. #38572
ANDREW M. DEMAREA MO lic. #45217

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ATTORNEY FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

S/ Samuel K. Lipari
Samuel K. Lipari

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

| | | |
|--|---|-----------------------|
| SAMUEL K. LIPARI, |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION |
| v. |) | |
| |) | No. 07-2146-CM |
| |) | |
| US BANCORP NA and |) | |
| US BANK NA, |) | |
| |) | |
| Defendants. |) | |
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MEMORANDUM AND ORDER

Plaintiff Samuel K. Lipari filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307) against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

I. Factual Background

On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. On April 10, 2007, the United States District Court for the Western District of Missouri transferred the case to this court pursuant to 28 U.S.C. § 1404(a). On September 4, 2008, the court dismissed all of plaintiff's claims except plaintiff's misappropriation of trade secrets claim (Doc. 137). On October 15, 2008, plaintiff filed a Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2). In plaintiff's stipulation, he withdraws his Motion for Leave to Amend Complaint, which had not been ruled on, and stipulates to the dismissal of his misappropriation of trade secrets claim with prejudice. He also states that "the plaintiff realizes that his claims for damages against the defendants under Count

III Trade Secrets Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act are now dismissed with prejudice under Rule 41(a)(2).” He further states, “The court must now end its conduct toward the parties in relationship to resolving any claim brought by plaintiff. Those claims have now been removed from this proceeding.” In defendants’ response to plaintiff’s stipulation, defendants agree to join the stipulation but only on the condition that the order of dismissal “reflect that plaintiff has been ordered to pay defendants’ attorneys’ fees for his non-compliance as ordered in Doc. No. 115, as well as all applicable costs of the action” (Doc. 153). In his reply, plaintiff disputes the fees and does not agree to dismiss the claims with defendants’ conditions (Doc. 155).

After filing his stipulation of dismissal and before defendants could respond to the stipulation, plaintiff appealed this lawsuit to the Tenth Circuit Court of Appeals. On November 14, 2008, the Tenth Circuit Court of Appeals abated the appeal pending this court’s resolution of plaintiff’s Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

II. Judgment Standard

Pursuant to Federal Rule of Civil Procedure 41(a)(1), a plaintiff can only voluntarily dismiss a case without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Under Rule 41(a)(2), the court may allow a plaintiff to voluntarily dismiss an action “upon such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2). “The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005) (quotation omitted). The court should grant a motion for voluntary dismissal “[a]bsent ‘legal prejudice’ to the defendant.” *Id.* (quotation omitted).

When determining “legal prejudice” the court is obligated to consider the novelty of the circumstances of the case. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The court should consider the relevant factors, including: “the opposing party’s effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation.” *Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Under Rule 41(a)(2), the court may impose terms upon the dismissal of a plaintiff’s claim, such as payment of attorneys’ fees or a limitation on the refiling of certain claims. *See Gonzales v. City of Topeka Kan.*, 206 F.R.D. 280, 283 (D. Kan. 2001) (citing 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2366, at 305–314 (1995)). *Id.* (quoting *American Nat. Bank and Trust Co. v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991)). “Conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action.” When the court decides to impose such terms, it must give the plaintiff an opportunity to withdraw its request for dismissal. *See id.*

III. Analysis

This matter cannot be voluntarily dismissed under Rule 41(a)(1) because defendants have answered the complaint and the parties have not filed a joint stipulation of dismissal. Thus, the court will consider plaintiff’s request to dismiss the lawsuit under Rule 41(a)(2). After reviewing the record, the court cannot say that plaintiff’s proposed voluntary dismissal is “[a]bsent ‘legal prejudice’ to the defendant.” On August 18, 2008, the court ordered plaintiff to pay reasonable attorneys’ fees and expenses related to defendants’ Motion To Compel Compliance with Rule 26(a)(1). The court ordered the parties to file pleadings regarding the appropriate amount of the fees and expenses. On November 26, 2008, Magistrate Judge Waxse ordered plaintiff to pay defendant’s reasonable attorneys’ fees and expenses in the amount of \$700 (Doc. 158).

The court finds that at this stage of the proceedings any voluntary dismissal must recognize the Judge Waxse's November 26, 2008 order regarding attorneys' fees and include an order for plaintiff to pay defendants' attorneys' fees and expenses as set forth in that order. At the time plaintiff filed his stipulation, Judge Waxse had awarded defendants their fees but had not set the amount. Because plaintiff was unaware of the amount of fees he would be required to pay when he filed his stipulation for an order of dismissal, plaintiff should have an opportunity to withdraw his stipulation. Plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss plaintiff's misappropriation of trade secrets claim—the only claim remaining in this action—and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

Dated this 26th day of November 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,

Plaintiff,

v.

U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION,

Defendants.

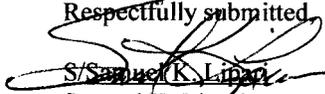
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FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
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TIMOTHY J. COHEN
CLERK
BY _____ DEPUTY
AT KANSAS CITY, KS

PLAINTIFF'S AMENDED NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding \$700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,


~~S/Samuel K. Lipari~~
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

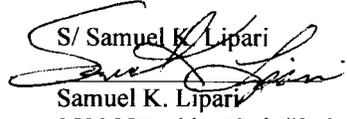
I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

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S/ Samuel K. Lipari

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**IN THE UNITED STATES COURT
WESTERN DISTRICT OF MISSOURI**

| | | |
|---------------------------------|---|----------------------------|
| SAMUEL K. LIPARI, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Case No. 4:06-cv-01012-FJG |
| |) | |
| U.S. BANCORP and |) | |
| U.S. BANK NATIONAL ASSOCIATION, |) | |
| |) | |
| <i>Defendants.</i> |) | |

PLAINTIFF'S SECOND AMENDED NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the Kansas District Court magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding \$700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

December 9, 2008

Elisabeth A. Shumaker
Clerk of Court

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

US BANCORP NA; US BANK NA,

Defendants - Appellees.

No. 08-3338
(2:07-CV-02146-CM-DJW)

ORDER

The plaintiff in underlying district court proceeding, Samuel K. Lipari, has filed what he styles as "Plaintiff's Amended Notice of Appeal" following his initiation of a prior attempted appeal, our Case No. 08-3287.

Fed. R. App. P. 3(c)(1)(B) requires an appellant to "designate the judgment, order, or part thereof being appealed." The appellant states only in his amended notice of appeal that he seeks to appeal "subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding \$700.00 in attorney fees and the trial judges' memorandum and order." No dates or docket numbers for these orders are provided.

The "amended" notice of appeal was filed on December 3, 2008. It appears that Mr. Lipari is attempting to appeal the order entered November 26, 2008,

Docket No. 158. That order awarded the defendants \$700.00 in attorneys fees.

An award of attorneys fees is collateral to and separate from a decision on the merits. See White v. New Hampshire Dep't of Emp. Sec., 455 U.S. 445, 451-52 n.13 (1982). We have accordingly opened a new appellate docket for this apparent appeal from the order granting attorneys fees to the defendants. The appellant will be obligated to pay the appellate filing and docketing fees for this appeal, or else be granted leave to proceed *in forma pauperis*.

The order that Mr. Lipari seeks to appeal was entered by a magistrate judge, not the district court judge. It does not appear that the case was being tried to the magistrate judge by consent of the parties. See 28 U.S.C. §§ 636 & 1291.

Within 14 days from the date of this order, Mr. Lipari shall (1) either pay the \$455.00 filing fee for this appeal or file in the district court a motion seeking leave to proceed *in forma pauperis* in this appeal; and shall (2) file with this court a memorandum brief explaining what order or orders of the district court he is attempting to appeal and the governing federal laws that would establish any basis for this court's jurisdiction.

Failure to comply with the directives of this order will result in dismissal of the appeal for failure to prosecute, pursuant to Tenth Cir. R. 42.1, without further notice to the parties.

Within 14 days from the date of service of Mr. Lipari's memorandum brief, the defendants shall file their response to his memorandum brief stating their

views on whether appellate jurisdiction exists in this court for this appeal.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

A handwritten signature in black ink, appearing to read "Douglas E. Cressler", written in a cursive style.

by:
Douglas E. Cressler
Chief Deputy Clerk